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CANONICAL AND LEGAL FALLACIES OF THE McGRATH THESIS ON REORGANIZATION OF CHURCH ENTITIES

REV. ADAM MAIDA*

A few years ago, Msgr. John McGrath addressed this distinguished group of attorneys, and introduced a theory of law, both canon law and civil law, concerning the ownership of our religious institutions. He made some practical conclusions and recommendations. To this day, to the best of my knowledge, his theories have not been rebutted, his recommendations have received wide acceptance, and the consequences have been most serious for the Church. McGrath has stated, "If anyone owns the assets of the charitable or educational institution, it is the general public. Failure to appreciate this fact has led to the mistaken idea that the property of the institution is the property of the sponsoring body."¹ Thus, what Henry VIII did with a sword in England, what Napoleon did with his armies in France, what Lenin did with a political philosophy, McGrath has attempted to do, and has succeeded in many cases, with a legal theory. What has utterly amazed me is the unchallenged receptivity of the theory and its conclusions throughout the country.

The background out of which his thesis grew and the rationale upon which it was developed was strongly conditioned upon the propitious time in which it appeared.

The background and rationale for his thesis is predicated upon three fundamental concepts:

- (1) The need for change and updating as a result of Vatican II.
- (2) The conviction that the Church should be a witness to poverty in the world.
- (3) Concepts of democracy, or should I say consumerism, ought to be operative in the government of the Church.

The first concept is articulated by McGrath as follows:

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¹ J. McGRATH, *CATHOLIC INSTITUTIONS IN THE UNITED STATES: CANONICAL AND CIVIL LAW STATUS* 33 (1968).

Since the close of Vatican Council II great changes have been taking place in the colleges, hospitals, and other institutions conducted by the Catholic Church. Laymen, both Catholic and non-Catholic, have been added to the governing boards of our institutions in such numbers that they are often in the majority. It is the rare institution that is not engaged in rewriting its by-laws or amending its charter. The rapid changes taking place in technology, medicine, and society have called forth new challenges to those who conduct institutions in the modern world. Change is the order of the day.²

The second concept, that of poverty, is expressed in these words:

The attitude of the general public is influenced by the way in which Catholic institutions are presented to the community. The assets of the hospital or college may be looked upon as the property of the diocese or religious community, in which case the sponsoring body is thought to be quite wealthy. The same institutions can be presented as public institutions not owned but merely conducted under the auspices of the diocese or religious community. The image is then one of service, and the meager income of the religious staff is the Church's witness to poverty.³

The third concept, that of democracy or consumerism, is illustrated in the following brief paragraph:

It has been repeatedly emphasized throughout this study that our Catholic institutions of higher education and public health are institutions of public trust. Their task is primarily one of service to the general public, and all the groups served by these institutions should be represented on the board of trustees: the local civic and business community, interested professional groups, and alumni. In this way policy can be made with a view toward the total role of the respective college or hospital. Furthermore, implementation of this recommendation would provide a larger class of eligible, competent professionals from which members of the board may be selected.⁴

Furthermore, two events had taken place which made his theories not only seem reasonable but even desirable.

First, the promise and fact of federal and state aid to educational and health related institutions was upon us. Uncle Sam and little brother, State Government, were Messiahs arriving on the scene to save our institutions from the brink of financial disaster.

Secondly, the Horace Mann cases in Maryland dealt a severe blow to participation in federal and state aid programs, because three out of the four of the dependent institutions were adjudged "too sectarian", and thus denied participation in the educational aid programs under the Constitution of Maryland. The United States Supreme Court refused to grant certiorari. The course of action was clear: McGrath's proposal seemed a salvation. He recommended changes in corporate charters and bylaws to

² *Id.* at 1.

³ *Id.* at 3.

⁴ *Id.* at 34-35.

reflect the “public” nature of our Catholic institutions and further urged that the government and control of these institutions be entrusted to competent lay people representing the broad spectrum of the community, and finally that the Religious Order or Diocese assume a sponsoring role rather than an ownership role in its relationship to its institutions. In the judgment of many, this would erase the sectarian character from the nature of our institutions and thus make them available for a participation in federal and state aid programs of one nature or another.

Lest my purpose in speaking before you is misconstrued, I want to make it abundantly clear that I am dedicated to the preservation of the rights of the Church in a free Society, to the Church’s right to own and administer property as a means of effecting Her Mission in the World. We need not apologize to anyone for the institutions we own—they are valid signs of the work of service done in Christ’s name. Furthermore, notwithstanding anything McGrath has said, our institutions under the Canon Law of the Church are either moral persons or are ecclesiastical properties belonging to or owned by moral persons. They are subject to the Canon Law of the Church respecting their government and administration. The civil law incorporation does not destroy our institutions as moral persons and does not expropriate the ecclesiastical goods of the Church. All of this, however, must be understood in proper context.

Briefly, we need to understand the civil and canon law premises of our problem. A moral person may be defined as “a juridic entity constituted by an act of competent authority, existing independently of other persons and endowed with the capacity of acquiring and exercising rights as well as of contracting obligations, by the means and to the extent determined by the competent authority.”⁵

In general, it may be said that moral persons are to the Church what corporations are in our civil society. Moral persons are created in one of two ways:

- (a) the law itself provides for them, *e.g.*, the very fact that a diocese or parish or religious order is created, it has a moral personality conferred by law.
- (b) or, a moral person may be created by the issuance of a formal decree of erection given by a competent ecclesiastical authority.

This latter method is the nub of the canonical controversy, McGrath has argued, since the law does not automatically confer moral personality, and since none of our hospitals and colleges, except Catholic University and Niagara University, have been erected as moral persons through the issuance of a formal decree by the proper ecclesiastical authority, they are not moral persons in the Church and the properties they own are not ecclesiastical properties. But who owns these properties? Where is title? He argues, most of these institutions are incorporated by the State, they are creatures

⁵ 1 J. ABBO & J. HANNAN, *THE SACRED CANONS* 144 (1952).

of the State, they are governed and administered according to the law of the State, they function under their respective corporate charters and by-laws, they live under the watchful eye of the attorney general, and finally, all properties owned by these institutions have their legal title in the corporation and their equitable title in the general public whom they serve in a charitable and public way.

In response to McGrath's canonical thesis, I cannot accept his conclusion that the properties owned by our charitable institutions are not ecclesiastical property under the laws of the Church. I can accept part of his civil law analysis, but deny his conclusion that equitable title to these institutions is in the general public and that services and money contributed by Dioceses, Religious Orders or Catholic Charities are to be considered and looked upon as gifts given over to civil law corporations and beyond reach or claim of ecclesiastical authorities.

I am reluctant to bore you with an intricate canonical analysis of the canonical problem involved and a refutation of McGrath's position. Bear with me for a minute or two.

Canon Law is clear that the property owned by a moral person is ecclesiastical property or ecclesiastical goods. These properties are managed or administered by the moral person according to the norms of Canon Law. If the law is not followed, the actions of the moral person may be illicit or perhaps invalid. For example, let us assume that certain ecclesiastical property is being sold. The law provides for appraisals to be made prior to sale. If such an appraisal is not made and the moral person receives fair market value, Canon Law would look upon the transaction as valid, but illicit. On the other hand, let us assume that a Religious Order owns a hospital, built and maintained solely by private funds and not separately incorporated. Let us further assume that the Religious Order decides to give the hospital to City X. Canon Law would characterize such a transaction as an alienation by way of gift. Without the proper permission of ecclesiastical authorities in Rome, such a transaction, canonically, would be null and void. The Religious Order would be acting *ultra vires*. The Holy See would have the right to demand a rescission of such a gift and demand re-conveyance back to the Religious Order. The point is, once properties are designated as ecclesiastical, those who administer and govern these properties are bound to the Canon Law of the Church in the discharge of their responsibility. This includes Bishops, Provincials, Major Superiors, priests, lay people—every Catholic who is bound to the laws of the Church.

Furthermore, we live in a pluralistic society. Sound administration would dictate that ecclesiastical administrators take all reasonable means to protect the patrimony of the Church and conserve her assets so that the Church can continue to do the work of Christ in the world. Among these reasonable means may be a decision to incorporate a hospital or college. Because the Church avails herself of these legal mechanisms to protect her assets and facilitate the administration of her institutions in a complex society, is in no way to be construed as a waiver of her claim over these

goods and properties as ecclesiastical. At the same time, the Church recognizes that the moment she avails herself of these civil law devices, she in some way surrenders some of her autonomy in the ownership, government and control of these properties.

Let me make one more canonical point before considering some real life examples which illustrate the problem. McGrath has taken the position that our colleges and hospitals are not moral persons in the Church, therefore, the assets which comprise these institutions are not ecclesiastical properties. These institutions, because they are incorporated, have their existence from the state; legal title is in the corporation and equitable title in the general public. I have taken the position that these institutions are ecclesiastical properties because they do belong to moral persons in the Church. The Religious Order or diocese that founded, constructed or caused these institutions to come into being and which has supported, funded, operated and managed these institutions, is a moral person in Canon Law. These institutions are the ecclesiastical property of such a diocese or Religious Order. The incorporation of such institutions does not constitute an alienation by way of gift of the assets contributed by the Diocese or Religious Order to the civil law corporation. In reality, the Church, for reasons of prudent management and administration of her assets, has availed herself of legal means to protect and conserve her assets and thus resorts to the civil law.

I wish to make a canonical argument in the alternative. No one would deny that a hospital or college can be established as a moral person in the Church, whose assets would then be ecclesiastical property. To become a moral person, the law requires a formal decree of erection by a competent authority. McGrath states that not a single authority indicates what this formal decree consists of or who the proper authority is. By a huge step in logic, he concludes that there are no formal decrees, and no ecclesiastical authorities have acted to create hospitals and colleges as moral persons. My research has led me to conclude that there are indeed eminent canon-lawyers who have talked about the nature of this formal decree and who the proper issuing authority might be. They speak about this formal decree being implicit, *i.e.*, establishing an institution and attributing to it the prerogatives of moral personality, such as the right to sue or be sued. They speak about the proper ecclesiastical authority as anyone who properly exercises such authority in the name of the Church, *e.g.*, Bishop or Provincial. Consequently, there is good canonical opinion to sustain the conclusion that these institutions are themselves moral persons in the Church, and the property or assets they hold are ecclesiastical. In the alternative, if they are not moral persons, they are ecclesiastical properties belonging to moral persons such as a Diocese or Religious Order.

Let us look at some examples:

Hypothetical #1:

Religious Order "A" was founded in 1900 and at the time of foundation acquired ten acres of ground upon which it built its monastery. In

1910, upon legal advice of its attorney, the Order was incorporated under the laws of the state. In 1920, this flourishing Order constructed a hospital adjacent to the monastery upon a portion of the ten acre tract originally purchased by Religious Order A. The hospital was constructed with funds totally contributed by the priests of Religious Order A. In 1970, with dwindling vocations and rising costs, Religious Order A wants to sell the hospital. What are the civil law and canonical consequences of this decision?

Religious Order A is a moral person in the Church. It is constituted as such by the operation of law in that from the moment it was constituted an ecclesiastical entity, Canon Law recognized it as a collegiate moral person. As such, all property titled in the name of Religious Order A is ecclesiastical property because it belongs to a moral person in the Church. Therefore, the hospital, owned and operated by Order A, and located on grounds of the monastery, is without question ecclesiastical property and subject to all the laws and regulations of Canon Law and the particular constitution of Order A concerning the administration of Church property. The fact of incorporation in 1910 changed nothing of the ecclesiastical juridical personality of Order A in 1910; it simply imposed upon it a legal personality under the civil law with corresponding rights and obligations in addition to the moral personality Religious Order A enjoyed from its beginning in 1900. Assuming no restriction in the corporate charter, or state law, Order A may sell the hospital. However, since the hospital is ecclesiastical property, the law governing alienation must be observed and consequently appropriate permission obtained from the Holy See.

One may conclude that the sale of the hospital is subject to the Canon Law of the Church by arguing in the alternative that the hospital itself is a non-collegiate moral person. It may be assumed that the decision to build the hospital was made by competent ecclesiastical authority, namely, the Major Superior of Order A. It may further be assumed that this decision was communicated to the Religious Community and indeed to general community at large. Permission to contract a debt may have been solicited from the Holy See. This decision and pronouncement of the intention of Order A to commit money and resources to the construction of a hospital in and of itself is sufficient to constitute the formal decree wherein juridical personality is conferred. Furthermore, deciding to construct the hospital, it may be assumed that the hospital was given authority, and in fact exercised authority, to own hospital property and be responsible for its contractual obligations, thus exposing itself to the possibility of suing or being sued. Having attributed to the hospital the distinctive characteristics of moral personality, it may be concluded that the competent ecclesiastical authority conferred a moral personality upon the hospital.

Hypothetical #2:

Religious Order "B" was founded in 1900 at which time it purchased ten acres of ground and constructed a monastery. In 1910 upon advice of its attorney, Religious Order B was incorporated. In 1920, Religious Order B constructed a hospital on a portion of the ten acre tract. In 1930, to

insulate the assets of the Religious Order B from potential liability and to facilitate the management and administration of the hospital, the hospital was separately incorporated. Over the years, the civic community and the government have contributed approximately 25 percent of the funds used in capital construction. In 1970, Hospital B wants to sell its assets and use the proceeds to establish a retirement fund for its older priests. What are the civil law and canonical consequences of this decision?

This hypothetical illustrates the legal and canonical dimensions of a most difficult problem. Because Hospital B has a split juridical personality, responsible in one way to civil authority, and in another to ecclesiastical authority, inevitable difficult problems arise. When Hospital B was constructed in 1920, it had no legal personality of its own, either in civil law or canon law; in each instance, it was part of the monastery which was both a civil corporation and a moral person. In 1930, it received a distinct legal existence in civil law through incorporation. What did this imply? It meant that the state gave birth to a new juridic person; this corporation would now also be governed by the laws of the state and the corporation's own charter and bylaws. As a non-profit corporation it exists to serve the public good. The state is ultimately responsible to see that the purposes of this corporation are carried out, and assure the general public that, upon dissolution, the assets or proceeds from dissolution will be used for similar charitable purposes.

At the time of its incorporation, what happened to the canonical juridical status of this entity? Nothing. The canonical status of Hospital B remains essentially the same before and after the fact of incorporation. It continues to function in the same manner, serves the same charitable purposes, and operates under the same policies and procedures. The incorporation gives Hospital B a civil law status, with civil law rights, privileges and responsibilities. The state neither has authority nor the jurisdiction to radically affect the canonical status of a creature born of canon law. Similarly, the Church cannot radically effect any change in the juridical personality, created by the state. The canonical status of the hospital is not effected by the civil law incorporation and consequently the hospital retains the same canonical status it enjoyed prior to acquiring a new legal personality in civil law. Therefore, it may be concluded that the hospital, although separately incorporated, nevertheless remains ecclesiastical property which belongs to Order B; or in the alternative, it is a moral person constituted as a juridical personality pursuant to the rationale given in hypothetical #1 and the hospital assets are, in fact, ecclesiastical property. In any event, to the extent that Religious Order B made a contribution to the hospital, to that extent can Order B claim an equity in the hospital on the grounds that the equity represents ecclesiastical property and properly belongs to Order B. To the extent that the state or the general public have contributed to this hospital, to that extent they can claim an equitable right to the assets of the hospital.

Hypothetical #3:

Assume all the facts as in Hypothetical #2, *i.e.*, Religious Order C is founded in 1900, is incorporated in 1910, builds Hospital C in 1920, incorporates Hospital C in 1930, and in 1971, decides to merge with Hospital X, a general community, non-sectarian hospital to form a new health facility designated as Hospital Y.

The canonical and civil law analysis is similar to the conclusions drawn in #2, with the following modification. Hospital C, when it merges with Hospital X, essentially, substantially and effectively contributes to the creation of a new entity which is essentially distinct from the separate entities known as Hospital C and Hospital X. The complete mingling of assets, funds and resources and the surrendering of management and control of Hospital C in favor of the merged Hospital Y, is an alienation of ecclesiastical property and is subject to all canonical provisions for the alienation of property.

Hypothetical #4:

Assume the same fact situation as in Hypotheticals #2 and #3, except that in 1971 Religious Order D decides to surrender the complete management and control of the Hospital D to a lay Board of Trustees. The Board of Trustees has the ultimate responsibility for the operation of Hospital D; it can determine the policies and procedures under which the hospital operates; it can direct the management and administration of the hospital; it can hire or fire the administrator and personnel of the hospital; it has the power and authority to change the provisions of the bylaws and petition the state for a change in the corporate charter; it can effectively buy or sell or lease or encumber or mortgage the property which is owned by the hospital. To confer such authority, to surrender such control, to convey such powers is to substantially transfer over legal right, title and interest in Hospital D, and thereby effectively alienate what was ecclesiastical property. Consequently, the appointment of a lay Board of Trustees to Hospital D is an alienation by way of donation and requires the appropriate permission of the Holy See.

Hypothetical #5:

One final hypothetical. Religious Order E is founded in 1900 and incorporated in the same year. In 1971, several of its members form a corporation for the purpose of receiving twenty million dollars of government money to build a home for the aged. This new corporation has a lay Board of Trustees to manage this new facility and the Religious Order E has agreed to administer it. The Religious Order has not invested any monies in the facility and has not encumbered the property of the Religious Order by guaranteeing any loan to the new corporation. Hopefully, it is clear that the new health care facility is not a moral person in the Church, it is not ecclesiastical property, the creation of a lay Board of Trustees is not an alienation, and the new health care facility is in no way subject to the laws of the Church. It is a purely secular institution which happens to be operated and administered by a Religious Order.

As a practical matter, our institutions are creatures of two worlds, Church and State. They are born in both, and they exist in both. They have responsibilities to Church and State and are governed by both. Those of us who practice law on behalf of the Church in the context of civil law, must use every legitimate vehicle to protect and conserve the patrimony of the Church. On the other hand, each one of us, Bishop, priest, or layman is bound by the laws of the Church, including Her laws on the governance and administration of church property. The perplexing question becomes: How do we best conserve the property of the Church, the patrimony of the Church, in a pluralistic society where many forces work together against us and where inevitable conflict arises between canon and civil law? What devices and instrumentations of civil law can we use to protect our property rights which are guaranteed by the Constitution of the United States? The problems in this area are just beginning to unfold and we are wise if we put our houses in order.

The laws of various states will differ, but I propose to make a number of practical recommendations which will insure the Church's ownership and control of Her institutions, and at the same time, respect the law of the land in which we live.

I

Concerning the civil legal structure of Religious Congregations, the following observations are made:

- 1) I believe sound legal judgment dictates that every Religious Order be incorporated under the laws of the State in which the Motherhouse is located. The reasons for such a judgment are obvious. Under canon law, the responsibility for the government and administration of a Religious Community is in the Major Superior and her Council. They are ultimately accountable, not only to their membership, but also to the Holy See for their stewardship. The fact that a Religious Congregation has been cloaked with or assumes a juridical status according to civil law through incorporation, in no way waives or alters the responsibilities of a Major Superior and Her Council under Canon Law. Therefore, for purposes of consistency in asserting responsibility, government and control of the Religious Order, it would seem most desirable that the membership of the civil law corporation be limited to the Major Superior and Her Council. Thus the government and control of the Religious Order and the corporation will be consistent.
- 2) The charter of the Religious corporation should explicitly state that the Order is an instrumentality of the Roman Catholic Church and subject to all the doctrines, disciplines, laws, rules and regulations of the Catholic Church. One of the principle reasons for such language is to afford the Religious Order the protection guaranteed by the First Amendment to the United States Constitution.
- 3) The charter should also incorporate by reference, the Constitution and Bylaws of the Religious Order.
- 4) A dissolution clause should provide for the disposition of assets according

to the Canon Law of the Roman Catholic Church when and if the Religious Order should cease to exist.

II

An analysis of the legal corporate structure of an institution founded or sponsored or supported or funded by a Religious Order and its relationship to the Religious Order is a bit more complex. What legal devices are available to preserve and conserve the patrimony of the Church and the equity of a Religious Order in its institutions? How do we honor the trust, perhaps implied, of millions of religious and laity who have given their lives and resources so that these institutions might continue to be witnesses of charity performed in the name of Christ? We must make a distinction between those religious institutions which are newly founded and incorporated and those which are already incorporated and functioning for a long time.

A. Where a Religious Order is incorporating an institution to which it has committed substantial funds and resources, every effort should be made to secure the ownership and control of such an institution by the Religious Order. For the sake of clarity, let us assume the new institution is a hospital. The following recommendations are made for achieving this purpose:

- 1) The membership of the Hospital Corporation should be the same as the Religious Corporation, *i.e.*, Major Superior and Her Council.
- 2) The members of the Hospital Corporation should retain the right to nominate and appoint the trustees or Board of Directors of the Hospital Corporation.
- 3) To the extent that the Religious Order has committed funds to the Hospital Corporation, to that extent the Religious Corporation should hold a mortgage on the property, or a note secured by a deed of trust with the hospital as collateral, or even just a note of record. The point is that the ecclesiastical contribution should be preserved by some legal instrument enforceable in law. To the extent that such instruments restrict the borrowing capacity of the Hospital Corporation, to that extent the encumbrances held by the Religious Order can be subordinated to other debt obligations. These devices will make certain that the property rights of the Religious Order, the patrimony of the Church, will be preserved.
- 4) All transactions between the Religious Order and the Hospital Corporation should be at arms length. Compensation paid to religious personnel should be equivalent to comparable wages paid to lay personnel. Again, if the financial burden to the Hospital becomes too acute, any payment back should be evidenced by a note issued by the Hospital Corporation to the Religious Corporation.
- 5) The charter of the Hospital Corporation should indicate its Catholic sponsorship and its purpose should clearly indicate its Catholic orientation and acceptance of Catholic teaching. As the Tilton College case tells us, such a posture will not be fatal to participation in federal and most state aid programs.

- 6) A dissolution clause should provide that all the assets of the Hospital Corporation be distributed to the Religious Corporation to be used for similar charitable works of the Religious Congregation or to some other Religious Congregation which carries on such charitable works.

Perhaps the best way to preserve the ownership and control of ecclesiastical property is the creation of interrelationship of three corporations.

The Religious Corporation causes a hospital corporation to come into being. The membership of both are the same—Major Superior and Her Council. The sole purpose of the Hospital Corporation is to hold title to the real estate and act as the lessor of these properties to a third corporation, a managing corporation. The terms of the lease can be written so as to protect, by contract, the rights of Religious, *e.g.*, no abortions, Catholic philosophy, etc. The managing corporation could have greater flexibility in the operation of the hospital, in determining the make-up of its Board of Trustees etc., but ownership and control would be clear.

B. Where a Religious Corporation already exists, and where other institutions have already been incorporated, the following recommendations are made:

- 1) To the extent possible, the charter and bylaws should be changed to reflect the recommendations already made above.
- 2) To the extent possible, the debt obligations of the incorporated institution to the Religious Corporation should be made a matter of record and proper legal instruments should be drawn to reflect this condition.
- 3) All future financial activity of the institution with the Religious Order should reflect the arms-length transaction relationship spoken of above.

III

A very brief remark or two on diocesan corporations as such. In many cases, it is inevitable and even desirable that various diocesan institutions enjoy a separate incorporation. However, the non-profit character of such corporations, not only subjects such institutions to the non-profit corporation law of the state, but also to the scrutiny and surveillance of the attorney-general. Furthermore, the mood of federal taxing authorities seems to indicate that, like private foundations, non-profit corporations will soon be subject to careful examination by federal and state authorities. On the other hand, the Diocese, as a canonical institution, as a Church, will enjoy, for a while longer, immunity from such surveillance. Furthermore, the Diocese and its patrimony enjoys certain religious freedoms guaranteed by the First Amendment to the United States Constitution. Therefore, to the extent that diocesan properties and institutions can be held in the name of the Diocese as a canonical entity, they would seem to enjoy the greatest freedom from governmental interference and also be afforded the greatest protection under our Constitution.

If this presentation has seemed a bit sketchy, I apologize. However, the issues are complex but very important. Billions of dollars are involved.

As attorneys, we have the obligation of preserving this patrimony for the Church. I hope I have cast a little light on this subject.